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SABAH LAND DEVELOPMENT BOARD v. TERAJU HIJAU SDN BHD

COURT OF APPEAL, KOTA KINABALU
ABDUL RAHMAN SEBLI JCA
KAMARDIN HASHIM JCA
B KAMALUDIN MD SAID JCA
[CIVIL APPEAL NO: S-02(NCVC)(W)-1140-06-2017]
19 NOVEMBER 2018

C ***CONTRACT:*** *Agreement – Breach – Claim for payment due and outstanding – Allegation that defendant could not fulfil obligations under agreement – Whether plaintiff produced invoices to prove allegation that there was sum due and outstanding – Whether improbable for Judicial Commissioner to rely on oral testimony of witnesses – Whether Judicial Commissioner erred in reversing burden of proof from plaintiff to defendant in relation to alleged invoices – Whether*
D *defendant's duty to fill up gaps in plaintiff's case – Whether there was breach of provisions of ss. 65 & 66 of Evidence Act 1950 – Whether plaintiff wrongfully assumed defendant repudiated agreement – Whether plaintiff's election to accept purported repudiation invalid – Whether plaintiff failed to prove case on balance of probabilities – Whether plaintiff's claim on liquidated damages allowed*

E The appellant ('defendant') and the respondent ('plaintiff') entered into an agreement with the sole objective to develop, supply and operate an oil palm nursery in an effort to eradicate poverty in Tongod, Sandakan by setting up agricultural and agro-based development projects. By the said agreement, the defendant agreed to engage the plaintiff to develop, supply and operate an oil
F palm nursery for a period of five years. After the said agreement had been in effect for four years, the defendant managed to source and supply some 284,840 seedlings, leaving a shortfall of 1,015,140 seedlings to be supplied. The plaintiff claimed that the defendant had owed them an outstanding sum of RM5,357.88 for the works done. Subsequently, the plaintiff wrote to the
G defendant to enquire about the supply and delivery of the remaining balance of the seedlings. After several letters, the defendant responded by proposing to negotiate with the plaintiff to extend the period of the said agreement. The parties proceeded to negotiate the terms of the said agreement to be extended for another year. During the negotiations, the plaintiff *vide* letter P6 gave
H notice to the defendant that since the defendant could not fulfil their obligations under the said agreement, the plaintiff treated that the defendant had repudiated the said agreement and that the plaintiff accepted the defendant's repudiation. Notwithstanding P6, the parties continued with their negotiations to extend the period of the said agreement. However, such negotiations halted upon the issuance of the plaintiff's writ of summons and
I statement of claim. The thrust of the plaintiff's claim was that the defendant had repudiated the said agreement by failing to observe cl. 9.23 (a) and (b) and cl. 9.24 of the said agreement. At the High Court, the Judicial Commissioner ('JC') ruled in favour of the plaintiff, holding that, *inter alia*,

the defendant through conduct had terminated the said agreement thereby giving the right to the plaintiff to claim for the amount due and to claim for liquidated damages. Dissatisfied, the defendant appealed. The issues that arose were (i) whether the defendant had terminated the said agreement without reasonable cause; (ii) whether the correspondences between the parties made on 'without prejudice' basis was capable of varying the terms of the said agreement to the effect that (a) the period of the said agreement had been extended; and (b) the new offers should follow the intention of the said agreement; and (iii) whether the plaintiff was entitled to the liquidated damages in accordance with cl. 9.23 and 9.24 of the said agreement.

Held (allowing appeal with costs)
Per Kamardin Hashim JCA delivering the judgment of the court:

(1) The plaintiff had never supported and/or corroborated their allegation that the sum of RM5,357.88 was due and outstanding. They had failed to produce the invoices allegedly sent to the defendant. The invoices, if any, were material and the best evidence to determine the existence of the alleged outstanding balance and to establish the number of days outstanding as required under cl. 9.3. It was improbable for the JC to rely on oral testimony of witnesses, which at best was corroborative in nature. The existence and the contents of the invoices must be proved by the production of the invoices in the court. The JC had erred in law and in fact when His Lordship held that the defendant had breached cl. 9.23 of the said agreement. The JC had also erred in his finding that the outstanding amount of RM5,357.88 was beyond the 14 days period as stipulated in cl. 9.23. (paras 28, 32 & 33)

(2) The JC not only relied on oral testimony without proof of the existence of the invoices, the important documents to establish the plaintiff's claim, His Lordship had reversed the burden of proof from the plaintiff to the defendant in relation to the alleged invoices. His Lordship criticised and put the blame on the defendant for the failure of the defendant to disprove the purported invoices and the outstanding amount thereunder. The burden of proof lay on the plaintiff. It was not the defendant's duty to fill up the gaps in the plaintiff's case. The JC had committed an error of law and in fact when he reversed the burden of proof to the defendant. Further, by relying on the oral evidence of the plaintiff's witnesses, which were secondary in nature, the JC had breached the provisions of ss. 65 and 66 of the Evidence Act 1950 due to failure by the plaintiff to produce the alleged invoices. (paras 33-35)

(3) The plaintiff had wrongfully assumed that the defendant had repudiated the agreement and as such the plaintiff's election to accept the purported repudiation was invalid and/or bad in law. Therefore, the JC erred in law and in fact when His Lordship held that the plaintiff was entitled to determine the employment of operator (plaintiff) under the said agreement by giving notice in writing to the defendant. The defendant

never had any intention to terminate or repudiate the said agreement. Instead, the defendant was offering to extend the said agreement for another year and invited the plaintiff to negotiate the matter. There was no evidence of an absolute refusal to perform their part of the contract by the defendant. The plaintiff was therefore not justified in repudiating the said agreement. (paras 38 & 40)

(4) The JC had erred in law and in fact when His Lordship misconstrued cl. 9.23(b) by holding that the defendant had breached cl. 9.23(b) by evincing an intention not to be bound by the said agreement thereby entitling the plaintiff to liquidated damages under cl. 9.24 when cl. 9.23(b) contemplated an act by the defendant terminating the said agreement. Further, the 'without prejudice' letter from the plaintiff was inadmissible in evidence. However, the JC had relied on the same 'without prejudice' basis letter in holding that the plaintiff had succeeded in establishing that the defendant had evinced an intention not to be bound by the said agreement. The JC had erred in law and in fact in his appreciation of the law relating to 'without prejudice' letter of correspondences. (paras 41 & 44)

(5) Since the plaintiff had failed to prove their case on a balance of probabilities, their claim on liquidated damages must fail. The plaintiff had failed to prove that the said agreement was duly terminated due to the breach of contract by the defendant. The purported termination and/or repudiation of the said agreement by the plaintiff was premature and unlawful; and not due to any breach by the defendant. Thus, the decision of the JC could not be sustained. There was a misdirection on the law and on the facts by the JC in allowing the plaintiff's claim and in awarding damages to the plaintiff. (paras 48 & 50)

Bahasa Malaysia *Headnotes*

Perayu ('defendan') dan responden ('plaintif') memasuki satu perjanjian dengan satu-satunya objektif untuk membangunkan, membekalkan dan mengendalikan operasi tapak semaian kelapa sawit sebagai satu percubaan untuk membasmi kemiskinan di Tongod, Sandakan, dengan mendirikan projek-projek pertanian dan berasaskan agrikultur. Melalui perjanjian itu, defendan bersetuju melantik plaintif untuk memajukan, membekalkan dan mengendalikan operasi tapak semaian kelapa sawit untuk tempoh lima tahun. Selepas perjanjian tersebut telah berkuat kuasa selama empat tahun, defendan berjaya mencari sumber dan membekalkan 284,840 anak-anak benih pokok kelapa sawit (benih-benih), meninggalkan satu penurunan 1,105,140 anak-anak benih untuk dibekalkan. Plaintif mendakwa defendan masih berhutang dengan mereka jumlah tertunggak RM5,357.88 untuk kerja-kerja yang sudah diselesaikan. Kemudiannya, plaintif menulis surat kepada defendan untuk bertanya tentang bekalan dan pembekalan baki anak-anak benih. Selepas beberapa surat dikirim, defendan membalas dengan cadangan berunding

dengan plaintif untuk melanjutkan tempoh perjanjian tersebut. Pihak-pihak meneruskan rundingan tentang syarat-syarat perjanjian tersebut untuk dilanjutkan selama satu tahun lagi. Semasa rundingan itu, plaintif melalui surat P6 memberikan notis kepada defendan menyatakan oleh kerana defendan tidak dapat memenuhi obligasi-obligasinya dalam perjanjian tersebut, plaintif menganggapkan defendan telah membatalkan perjanjian tersebut dan plaintif menerima pembatalan itu. Tanpa mengira P6, pihak-pihak meneruskan rundingan untuk melanjutkan tempoh perjanjian tersebut. Walau bagaimanapun, rundingan-rundingan itu telah dihentikan atas pengeluaran writ saman dan pernyataan tuntutan plaintif. Plaintif mendakwa defendan telah membatalkan perjanjian tersebut kerana kegagalannya mematuhi kl. 9.23 (a) dan (b) dan kl. 9.24 perjanjian tersebut. Di Mahkamah Tinggi, Pesuruhjaya Kehakiman ('PK') memihak pada plaintif dengan memutuskan, antara lain, bahawa defendan melalui kelakuannya telah membatalkan perjanjian tersebut dan dengan itu telah memberikan hak pada plaintif untuk menuntut jumlah yang terhutang dan untuk ganti rugi jumlah tertentu. Tidak berpuas hati, defendan merayu. Isu-isu yang timbul adalah (i) sama ada defendan telah membatalkan perjanjian tersebut tanpa kausa munasabah; (ii) sama ada surat menyurat antara pihak-pihak yang dibuat atas dasar 'tanpa prejudis' mampu mengubah syarat-syarat perjanjian tersebut hingga (a) tempoh perjanjian tersebut dilanjutkan; dan (b) tawaran-tawaran baru harus mengikut tujuan perjanjian tersebut; dan (iii) sama ada plaintif berhak memperoleh ganti rugi jumlah tertentu menurut kl. 9.23 dan 9.24 perjanjian tersebut.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Kamardin Hashim HMR menyampaikan penghakiman mahkamah:

(1) Plaintif tidak pernah menyokong dan/atau mengesahkan dakwaan bahawa jumlah RM5,357.88 masih terhutang dan tertunggak. Mereka gagal mengemukakan invois-invois yang kononnya telah dihantar kepada defendan. Invois-invois itu, jika ada, adalah amat penting atau keterangan terbaik untuk memastikan kewujudan jumlah tertunggak dan untuk membuktikan bilangan hari yang tertunggak seperti yang dikehendaki oleh kl. 9.3. Mustahil untuk PK bergantung pada testimoni lisan saksi-saksi, yang bersifat menyokong. Kewujudan dan kandungan-kandungan invois-invois harus dibuktikan melalui pengemukaan invois-invois di mahkamah. PK telah terkhilaf dari segi undang-undang dan fakta apabila memutuskan defendan telah melanggar kl. 9.23 perjanjian tersebut. PK juga terkhilaf dalam mendapati bahawa jumlah tertunggak RM5,357.00 telah melampaui tempoh 14 hari seperti yang ditetapkan dalam kl. 9.23.

(2) PK bukan sahaja bergantung pada testimoni lisan tanpa bukti kewujudan invois-invois, iaitu dokumen-dokumen penting untuk membuktikan tuntutan plaintif, PK juga telah menterbalikkan beban pembuktikan daripada plaintif kepada defendan berkaitan invois-invois yang didakwa. PK telah mengkritik dan meletakkan tanggungjawab pada defendan

kerana gagal menyangkal invois-invois dan jumlah tertunggak. Beban pembuktian terletak pada plaintif. Bukan tanggungjawab defendan untuk mengisi jurang-jurang kes plaintif. PK telah melakukan satu kekhilafan undang-undang dan fakta apabila menterbalikkan beban pembuktian kepada defendan. Tambahan lagi, dengan bergantung pada keterangan lisan saksi-saksi plaintif yang bersifat sekunder, PK telah melanggar peruntukan-peruntukan ss. 65 dan 66 Akta Keterangan 1950 akibat kegagalan plaintif mengemukakan invois-invois yang didakwa.

(3) Plaintif tersalah anggap bahawa defendan telah membatalkan perjanjian dan pilihan plaintif untuk menerima pembatalan itu adalah tidak sah dan/atau salah dari segi undang-undang. Oleh itu, PK terkhilaf dari segi undang-undang dan fakta apabila mendapati plaintif berhak menentukan pekerjaan pengendali (plaintif) bawah perjanjian tersebut dengan memberikan notis bertulis kepada defendan. Defendan tidak mempunyai niat membatalkan perjanjian tersebut. Sebaliknya, defendan menawarkan untuk melanjutkan perjanjian tersebut untuk satu tahun lagi dan mempelawa plaintif untuk berunding tentang perkara itu. Tiada keterangan bahawa defendan enggan melaksanakan tanggungjawabnya dalam kontrak. Dengan itu, tiada justifikasi untuk plaintif membatalkan perjanjian tersebut.

(4) Pesuruhjaya Kehakiman terkhilaf dari segi undang-undang dan fakta apabila beliau menyalahtafsirkan kl. 9.23 dengan memutuskan defendan melanggar kl. 9.23(b) dengan memperlihatkan niat untuk tidak diikat oleh perjanjian tersebut dan dengan itu plaintif berhak memperoleh ganti rugi jumlah tertentu bawah kl. 9.24 apabila kl. 9.23 mempertimbangkan kelakuan defendan membatalkan perjanjian tersebut. Tambahan lagi, surat 'tanpa prejudis' daripada plaintif tidak diterima sebagai keterangan. Walau bagaimanapun, PK bergantung pada surat 'tanpa prejudis' yang sama dalam memutuskan plaintif berjaya membuktikan defendan memperlihatkan niat untuk tidak diikat oleh perjanjian tersebut. Pesuruhjaya Kehakiman terkhilaf dari segi undang-undang dan fakta dalam pertimbangan undang-undang berhubungan surat menyurat surat 'tanpa prejudis.'

(5) Oleh kerana plaintif gagal membuktikan kes atas imbangan kebarangkalian, tuntutan atas ganti rugi jumlah tertentu harus gagal. Plaintif gagal membuktikan perjanjian tersebut telah dibatalkan akibat pelanggaran kontrak oleh defendan. Pembatalan perjanjian tersebut oleh plaintif adalah pramatang dan tidak mengikut undang-undang; dan bukan kerana defendan telah melanggarnya. Oleh itu, keputusan PK tidak boleh dipertahankan. Terdapat satu salah arah undang-undang dan fakta oleh PK dalam membenarkan tuntutan plaintif dan dalam mengawardkan ganti rugi kepada plaintif.

Case(s) referred to:

Aneka Melor Sdn Bhd v. Seri Sabco (M) Sdn Bhd & Another Appeal [2016] 2 CLJ 563 CA ***(refd)***

Filati Lastex Elastofibre (M) Sdn Bhd v. Nikseng Development Sdn Bhd [2009] 1 LNS 162 HC ***(refd)***

Keruntum Sdn Bhd v. The Director of Forests & Ors [2017] 4 CLJ 676 FC ***(refd)***

Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd [2017] 5 CLJ 418 FC ***(refd)***

Mazlan Aliman & Anor v. Lembaga Kemajuan Tanah Persekutuan [2016] 1 LNS 971 CA ***(refd)***

Perbadanan Kemajuan Negeri Selangor v. Selangor Country Club Sdn Bhd [2016] 8 CLJ 211 CA ***(refd)***

The Carbon Company Sdn Bhd v. Ng Lee Hoon [2017] 6 CLJ 189 CA ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 65, 66, 101

Rules of Court 2012, O. 18 r. 13(3)

Other source(s) referred to:

Malaysian Civil Procedure 2018, Sweet & Maxwell, vol 1, pp 252-253

For the appellant - Sugumar Balakrishnan & Coralee-Jane Harry Sibungkil; M/s JT Kulai & Co

For the respondent - Chin Nyuk Kyeong & Alvin Leong Yin Yuan; M/s Chin Mirdin & Co

[Editor's note: For the High Court judgment, please see Teraju Hijau Sdn Bhd v. Sabah Land Development Board [2017] 1 LNS 1245 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Kamardin Hashim JCA:

Introduction

[1] This is an appeal by the appellant/defendant against the decision of the High Court Judicial Commissioner ('learned JC') sitting at Kota Kinabalu in allowing the respondent/plaintiff's claim with costs. After a full trial, the learned JC entered judgment in favour of the respondent/plaintiff in the following terms:

(i) that the defendant shall pay the sum of RM5,357.88 to the plaintiff being the outstanding balance for work executed;

(ii) that the defendant shall pay the sum of RM2,000,000 to the plaintiff as agreed liquidated damages under the agreement dated 22 June 2010;

(iii) that the defendant shall pay statutory interest at the rate of 5% per annum from the date of judgment to the date of full payment to the plaintiff; and

(iv) that the defendant shall pay costs of RM7,000 subject to 4% allocatur to the plaintiff.

[2] We heard the defendant's appeal on 17 July 2018. After considering the written submissions and the oral arguments from both parties on the issues raised, we unanimously allowed the appeal. We now give our reasons for allowing the appeal.

[3] For ease of reference, parties will be referred to as they were in the proceedings before the High Court.

Background Facts

[4] The factual matrix of this case was not much in dispute. The subject matter of the present appeal relates to an agreement dated 22 June 2010 between the plaintiff, Teraju Hijau Sdn Bhd and the defendant, Sabah Land Development Board ('the said agreement').

[5] The plaintiff is a company dealing with the operation of nursery for oil palm seedlings. The defendant is a statutory body constituted under the Sabah Land Development Board Enactment 1981.

[6] The parties entered into the said agreement with the sole objective to develop, supply and operate an oil palm nursery in an effort to eradicate poverty in Tongod, Sandakan by promoting agropolitan, that is, by setting up agricultural and agro-based developments projects in Tongod.

[7] By the said agreement, the defendant had agreed to engage the plaintiff to develop, supply and operate an oil palm nursery for a period of five years with a minimum of 1,300,000 oil palm seedlings back to the defendant at an agreed contractual rates of RM8.50 per seedlings.

[8] After the execution of the said agreement, the plaintiff began managing and operating the nursery. After the said agreement had been in effect for approximately four years, the defendant had managed to source and supply some 284,860 seedlings, leaving a shortfall of 1,015,140 seedlings to be supplied. The plaintiff claimed that the defendant had owed them an outstanding sum of RM5,357.88 for the works done.

[9] Subsequently, by a letter dated 12 March 2014 (P12), the plaintiff wrote to the defendant to enquire about the supply and delivery of the remaining balance of the seedlings that the defendant was supposed to supply under the said agreement. There was no response from the defendant to the letter P12 and as well to a series of reminder letters which were exhibited as P9, P10, P11 and P13.

[10] The plaintiff then wrote another letter dated 9 January 2014 through their solicitors, Messrs Chin Mirdin & Co (P3). There was no response from the defendant to the solicitor's letter as well as to the subsequent two reminder letters. It was after the third reminder letter dated 13 January 2015 (P4), the defendant responded to the plaintiff's letters.

[11] In the said P4 letter, the plaintiff had reminded the defendant to reply to the letter P3 and stated further that failure to reply to the same would *inter alia* be deemed as the defendant's repudiation of the said agreement.

[12] The defendant responded *vide* a letter dated 14 January 2015 (p. 324, record of appeal, vol. 2B, part C). By this letter, the defendant proposed to negotiate with the plaintiff to extend the period of the said agreement. Parties proceeded to negotiate the terms of the said agreement to be extended for another year and that the seedlings to be raised up to 200,000 only; and the balance of the seedlings will be advised from time to time.

[13] During the negotiations, the plaintiff had, *vide* letter dated 31 March 2015 (P6), given notice to the defendant that since the defendant could not fulfil their obligations under the said agreement, the plaintiff treated that the defendant to have repudiated the said agreement and the plaintiff accepted the defendant's repudiation.

[14] Notwithstanding P6, the parties continued with their negotiations to extend the period of the said agreement. However, on or about 15 June 2015, such negotiations halted upon the issuance of the plaintiff's writ of summons and statement of claim.

[15] The thrust of the plaintiff's claim is that the defendant had repudiated the said agreement by failing to observe cl. 9.23 (a) and (b) and cl. 9.24 of the said agreement.

At The High Court

[16] At the High Court, the learned JC ruled in favour of the plaintiff after hearing the evidence and submissions of both parties. The learned JC held that:

(i) based on the evidence adduced in the trial, the main issue for determination was whether the plaintiff had succeeded in showing that there was non-compliance with cl. 9.23 and in the circumstances, whether the said agreement was repudiated by the defendant;

(ii) based on the evidence, although the defendant attempted to dispute the plaintiff's claims that they did not owe the outstanding amount of RM5,357.88, the learned JC of the view that the said challenges were untenable in view of the evidence adduced by the plaintiff during the trial;

(iii) the learned JC accepted the oral evidence and witness statement of PW3 that the defendant had failed to pay the plaintiff the amount claimed for the works done by the plaintiff;

(iv) the learned JC accepted the evidence of PW3 that three separate invoices were submitted to the defendant and they did not receive any payments for the invoices;

(v) the non-production of the three invoices was not fatal to the plaintiff's case as the issue of the outstanding amount was never disputed by the defendant except just a general denial;

(vi) the defendant had failed to rebut or claimed that there was no outstanding amount due to the plaintiff;

(vii) as the amount was overdue for more than 14 days, there was a breach of cl. 9.23 (a) and the plaintiff entitled to determine the said agreement by giving notice in writing to the defendant;

(viii) the defendant had evinced an intention through their conduct not to bound by the said agreement and the plaintiff was entitled to rely on the defendant's conduct to show that the defendant had repudiated or terminated the said agreement;

(ix) from the letter dated 14 January 2015, the defendant could no longer fulfill their obligation under the said agreement;

(x) the defendant's defence that they lack new development areas for them to plant the seedlings was a non-starter and was never pleaded in their defence. The lack of new development area is not relevant in determining the issue on termination of the said agreement;

(xi) the defendant was only able to raise and supplied 284,860 seedlings within four years and the defendant did not offer any explanation as to how they are going to comply with the said agreement;

(xii) the defendant could not rely on cl. 9.27 of the said agreement as it was never pleaded in their defence;

(xiii) the defendant could not on the negotiations and correspondences as they were on without prejudice basis and parties were not able to reach any settlement; and

(xiv) there was breached of cl. 9.23 (a) and (b); and plaintiff entitled to the liquidated damages as provided under cl. 9.24 of the said agreement.

[17] Being dissatisfied with the learned JC's decision, the defendant appealed to this court by way of a notice of appeal dated 15 May 2017.

Grounds Of Appeal

[18] Before us, learned counsel for the defendant posited the following grounds of appeal which may be summarised as follows:

(i) The learned JC had erred in law and in fact when he held that the defendant had breached cl. 9.23 (a) of the said agreement;

(ii) The learned JC had erred in law and in fact when he held that the outstanding amount was beyond the 14 days period as stipulated in cl. 9.23 (a) of the said agreement in the absence of the alleged invoices to support its finding;

(iii) The learned JC erred in law and in fact when he reversed the burden of proof from the plaintiff to the defendant in relation to the purported invoices and the outstanding amount thereunder when he based his finding on the failure of defendant to disprove the purported invoices and the outstanding amount thereunder;

(iv) The learned JC erred in law and in fact when he failed to hold that PW1 and PW3's evidence cannot be relied on to give secondary evidence of the purported invoices;

(v) The learned JC erred in law and in fact when he failed to direct his mind to cl. 9.23 (b) of the said agreement which expressly stated that this clause relates to the event of the plaintiff terminating the agreement without reasonable cause;

(vi) The learned JC erred in law and in fact when he held that the court must consider whether the said agreement had been terminated by way of repudiation/termination without any reasonable cause as provided under cl. 9.23 (b) and by doing so, the learned JC had rewritten the bargain between the parties which is not permissible in law;

(vii) The learned JC erred in law and in fact when he held that the plaintiff was entitled to determine the employment of the operator/plaintiff under the said agreement by giving notice in writing to the defendant;

(viii) The learned JC erred in law and in fact when he misconstrued cl. 9.23 (b) by holding that the defendant had breached cl. 9.23 (b) by evincing an intention not to be bound by the said agreement thereby entitling the plaintiff to liquidated damages under cl. 9.24 when cl. 9.23 (b) contemplates an act by the defendant terminating the said agreement;

(ix) The learned JC erred in law and in fact when he, after having made a finding that the defendant had not terminated the said agreement, had proceeded to hold that the defendant had breached cl. 9.23 (b);

(x) The learned JC erred in law and in fact when he held that the plaintiff was entitled to rely on the conduct of the defendant and the surrounding circumstances of the case to show that the defendant had repudiated or terminated the said agreement which on the facts of the case was wholly irrelevant in the context of cl. 9.23 (b);

(xi) The learned JC erred in law and in fact when he held that the plaintiff had succeeded in establishing that the defendant had evinced an intention not to be bound by the said agreement any longer by relying on the defendant's "without prejudice" letter dated 14 January 2015 despite the learned JC having ruled that the "without prejudice" letter dated 14 January 2015 is inadmissible in evidence; and

(xii) The learned JC erred in law and in fact in his appreciation of the law relating to "without prejudice" correspondences and when he held that the terms and the period of the said agreement was not varied by the correspondences of the parties.

[19] The appeal before us, as agreed by both parties focused on the following three issues:

(i) whether the defendant had terminated the said agreement without reasonable cause;

(ii) whether the correspondences between the parties made on "without prejudice" basis are capable of varying the terms of the said agreement to the effect that:

(a) the period of the said agreement had been extended; and

(b) the new offers should follow the intention of the said agreement; and

(iii) whether the plaintiff is entitled to the liquidated damages in accordance with cl. 9.23 and 9.24 of the said agreement.

Plaintiff's Submission

[20] The plaintiff had canvassed the following submissions before us in support of the learned JC's findings and decision which in favour of the plaintiff's pleaded case. The plaintiff criticised the defence filed by the defendant for being very brief which essentially geared towards the negotiations that took place between the parties through their correspondences that were subjected to "without prejudice" basis. It was argued that the only material allegations of fact pleaded in the defence related to the ultimately unsuccessful negotiations between the parties. Plaintiff argued further that the negotiations between the parties were irrelevant and the same show that the defendant had no real defence to the plaintiff's claim.

[21] The plaintiff relied on O. 18 r. 13(3) of the Rules of Court 2012 ('RC 2012'):

> Subject to paragraph (4), every allegation of fact made in a statement of claim or counterclaim which the party on whom it is served does not intend to admit must be specifically traversed by him in his defence or defence to a counterclaim, as the case may be; and a general denial of such allegations or a general statement of non-admission of them is not a sufficient traverse of them.•

[22] The plaintiff further referred to *Malaysian Civil Procedure 2018,* vol. 1 by Sweet & Maxwell at pp. 252-253 which states:

> Traverse must be specific – The traverse must be specific, and not general, and must not be evasive: *Kayat & Anor v Lim Yew Seng* [1972] 1 MLJ 26 ("Where a defendant denies an allegation of fact in the pleading, he must not do so evasively, but answer the point of substance. A denial must be specific (see Mallal's Supreme Court Practice Volume 1 at page 284). In

this case the denials of the defence are more of a general nature"). The pleader must deal specifically with every allegation of fact made – he must either admit it frankly or deny it boldly. Unpleaded traverses in relation to material allegations will be disregarded by the court: *Tang Kwor Ham & Ors v. Lembaga Kumpulan Wang Simpanan Pekerja* [2005] 8 CLJ 676. A traverse which follows too closely the precise language of the allegation may be held to be evasive: *Tildesley v. Harper* (1878) 7 ChD 403.

The traverse of a negative may itself be a pregnant negative in that it contains within itself and affirmative allegation. For example, in an action for buying and selling securities without the plaintiff's authority, a denial that the defendants had done so without the plaintiff's authority led to particulars being ordered of the authority that the defendants were alleged to have had: *Pinson v. Lloyd and National Provincial Bank Ltd* [1941] 2 KB 72, CA (Eng).

A general denial, or a general statement of non-admission, of allegations of fact is not a sufficient traverse, and such a defence may be struck out, or judgment may otherwise be entered: see for example *Packer Mohaideen v. K Ismail Ghaney Rawther & Co Ltd* [1963] MLJ 294; *Pernas Sime Darby Holdings Sdn Bhd v. M Poovanandran* [1986] 1 MLJ 418; *Sundram v. Arjunan* [1994] 3 MLJ 361; *Cristofori Music Pte Ltd v. Robert Piano Co Pte Ltd* [2000] 3 SLR 503.

It is common practice to end a defence with the statement "save as hereinbefore specifically admitted, the defendant denies each and every allegation contained in the statement of claim as though the same were set out herein and traversed *seriatim*" (per Lord Denning MR in *Warner v. Samson* [1959] 1 QB 297, CA (Eng), at 310-311). This practice is convenient in dealing with long and complicated statements of claim and immaterial allegations therein. However, it should not be adopted in dealing with the essential allegations. See *Harris v. Gamble* (1878) 7 ChD 877, *Rutter v. Tregent* (1879) 12 ChD 758; *Davie v. New Merton Board Mills Ltd* [1956] 1 All ER 379, HL; *cf Yayasan Sabah & Anor v. Yap & Son Borneo Enterprise Sdn Bhd & Ors* [1997] 5 CLJ 687.

[23] Plaintiff submitted that the defendant's defence only pleaded general denial of the plaintiff's statement of claim, in particular para. 6 which contained specific and material allegations regarding the outstanding contract fees of RM5,357.88 and the number of seedlings received. The rest of the plaintiff's submission merely alluded to the findings and decision of the learned JC.

Our Decision

[24] The appeal before us focused on three main issues regarding termination of contract, the plaintiff's claim and the liquidated damages. In this regard, the learned JC in his grounds of judgment relied on cl. 9.23 and 9.24 to allow the plaintiff's claim. Learned JC held that through conduct, the defendant had terminated the said agreement thereby giving right to the plaintiff to claim for the amount due and to claim for the liquidated damages.

[25] For ease of reference, cl. 9.23 and cl. 9.24 of the said agreement states as follows:

> 9.23 In the event of SLDB:
>
> (a) Failing to pay the Operator the amount due under this Agreement within fourteen (14) working days after the same shall be presented to SLDB for payment; or
>
> (b) Terminating the Agreement without any reasonable cause the Operator shall be entitled, to determine the employment of the Operator under the Agreement by giving notice in writing to SLDB.
>
> 9.24 In the event of such determination under Clause 9.23 hereof SLDB shall be under the same obligations to the Operator in regard to payment as specified in Clause 9.23 hereof as if this Agreement had been determined under the provisions of Clause 9.21 hereof and in addition SLDB shall pay to the Operator liquidated damages in the sum of RM2.00 for each of existing seedlings at the said Nursery and the remaining seedlings from the agreed 1,000,000 seedlings yet to be delivered to the nursery site at the time termination.

[26] It is the plaintiff's case that pursuant to the said agreement, the defendant had sourced and supplied oil palm seedlings to the plaintiff for raising at the nursery and the plaintiff had received payment for the work done except the balance of RM5,357.88. It is not disputed as evidenced by the correspondences that the plaintiff had demanded for the payment of RM5,357.88 from the defendant to which the defendant had neglected or refused to make any payment.

[27] We were mindful that the learned JC had accepted the plaintiff's version that they had sent the three invoices to the defendant, which were denied and without producing the same at the trial. In consequence thereof, the learned JC held that the plaintiff is entitled to terminate the said agreement under cl. 9.23 and claim liquidated damages under cl. 9.24.

[28] We were also mindful of the fact that the plaintiff had never supported and/or corroborated their allegation that the sum of RM5,357.88 was due and outstanding. We are saying that the plaintiff had failed to prove its case for the simple reason that they had failed to produce the invoices allegedly sent to the defendant and the plaintiff had also failed to prove the amount outstanding. It is the duty of the plaintiff to prove its case on a balance of probabilities as required under s. 101 of the Evidence Act 1950.

[29] Section 101 of the Evidence Act 1950 states:

> 101. (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

ILLUSTRATIONS

(a) A desires a court to give judgment that B shall be punished for a crime which A says B has committed.

A must prove that B has committed the crime.

(b) A desires a court to give judgment that he is entitled to certain land in the possession of B by reason of facts which he asserts and which B denies to be true.

A must prove the existence of those facts.

[30] In the case of *Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd* [2017] 5 CLJ 418, the Federal Court clearly held on the same point as follows:

[54] Section 101(1) provides that "Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist". "Section 101 states that the initial burden of proving a *prima facie* case in his favour is cast on the plaintiff ... " (*Woodroffe and Amir Ali Law of Evidence* 19th edn, vol. 3 at p. 3194). Illustration (b) to s. 101 puts it beyond doubt that the "burden of proof" rests throughout on the plaintiff. Section 102 provides that "the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side". "The initial onus of proving the case is always on the plaintiff" (*Sarkar Law of Evidence* 16th edn at 1593). Illustration (a) to s. 102 puts it beyond doubt that a plaintiff has the initial onus of proof.

[55] But "when (the plaintiff) gives such evidence as will support a *prima facie* case, the onus shifts on to the defendant, to adduce rebutting evidence to meet the case made out by the plaintiff. As the case continues to develop, the onus may shift back again to the plaintiff. It is not easy to decide at what particular stage, in the course of the evidence, the onus shifts from one side to the other. When after the entire evidence has been adduced, the tribunal feels it cannot make up its mind as to which of the versions is true, it will hold that the party on whom the burden lies has not discharged the burden, but if it has, on the evidence, no difficulty arriving at a definite conclusion, then the burden of proof on the pleading recedes into the background" (Woodroffe and Amir Ali, *supra*, at p. 3194; see also *Abrath v. North Eastern* Rly at 452). ... "the onus of proof may shift ... but the question must ultimately arise whether the person who is bound to prove the affirmative of the issue ... has discharged ... that burden" (*Jane Wakelin v. The London And South Western Railway Company* (1986) 12 App Cas 41; (1887) 12 App Cas per Lord Halsbury LC) or proved "his case sufficiently to justify a judgment in his favour" (*Stoney v. Eastbourne R D Council* [1927] 1 Ch 367, 397 per Lord Hanworth MR).

A [56] Thus, a plaintiff has both the burden of proof as well as the initial onus of proof. In *Britestone Pte Ltd v. Smith & Associates Far East Ltd* [2007] 4 SLR 855, the Singapore Court of Appeal per VK Rajah JCA, delivering the judgment of the court, explained that at the start of the plaintiff's case the burden of proof and the onus of proof coincide:

B > ... at the start of the plaintiff's case, the legal burden of proving the existence of any relevant fact that the plaintiff must prove and the evidential burden of some (not inherently incredible) evidence of the existence of such fact coincide. Upon adduction of that evidence, the evidential burden shifts to the defendant, as the case may be, to adduce some evidence in rebuttal. If no evidence in
C > rebuttal is adduced, the court may conclude from the evidence of the defendant. If, on the other hand, evidence in rebuttal is adduced, the evidential burden shifts back to the plaintiff. If, ultimately, the evidential burden comes to rest on the defendant, the illegal burden of proof of the relevant fact would have been discharged by the plaintiff. The legal burden of proof – a
D > permanent and enduring burden – does not shift. A party who has the legal burden of proof on any issue must discharge it throughout. Sometimes, the legal burden is spoken of, inaccurately, as "shifting"; but what is truly meant is that another issue has been engaged, on which the opposite party bears the illegal burden of proof.

E [57] The rule is that "the onus of proof of any particular fact lies on the party who alleges it, not on him who denies it; *et incumbit probation qui decit, non qui negat, Actori incibit probation* ... The plaintiff is bound in the first instance, to show a *prima facie* case, and if he leaves it imperfect, the court will not assist him. Hence the maxim *potior est condition defendantis*. A
F plaintiff cannot obviously advantage himself by the weakness of the defence. A plaintiff's case must stand or fall upon the evidence adduced by him. When, however, the defendant, or either litigant party, instead of denying what is alleged against him, relies on some new matter which, if true, is an answer to it, the burden of proof changes sides; and he, in his turn, is bound to show a *prima facie* case at least and, if he leaves it
G imperfect, the court will not assist him. "*Reus excipendo fit actor*" (*Woodroffe and Amir Ali*, *supra*, vol. 3 at pp. 3190-3191).

[31] In the instant case, we observed that the learned JC merely relied on the oral testimonies of plaintiff's witnesses who alleged that there was an outstanding balance owed by the defendant for the sum of RM5,357.88. The
H witnesses also alleged that they had sent three separate invoices to the defendant by way of courier and fax services. The defendant on the other hand strongly denied the plaintiff's witnesses allegations. The defendant strongly asserts that the alleged invoices were not pleaded in the plaintiff's statement of claim, the invoices were not included in the plaintiff's bundle
I of documents and proof of delivery of the said invoices were not pleaded and not included in the pleading and in the bundles. Apart from that, the said amount of RM5,357.88 allegedly owed by the defendant were not proven either.

[32] We agreed with the defendant that the learned JC erred in law and in fact when His Lordship held that the defendant had breached cl. 9.23 of the said agreement. We are as well agreed that the learned JC also erred in his finding that the outstanding amount of RM5,357.88 was beyond the 14 days period as stipulated in cl. 9.23. We agreed with our earlier decision in *Aneka Melor Sdn Bhd v. Seri Sabco (M) Sdn Bhd & Another Appeal* [2016] 2 CLJ 563 where this court had this to say:

> [28] The plaintiff posited that the very fact payment was made by JKR to the first defendant showed that the works executed by the plaintiff was evaluated and approved by JKR. Therefore, it was argued that the plaintiff shall be entitled to the amount claimed.
>
> [29] With respect, we disagree. The burden of proving each and every item of the progress claim lies squarely on the plaintiff. In *Re B* [2008] UKHL 35, Lord Hoffmann using a mathematical analogy explaining the burden of proof stated:
>
> > If a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.
>
> [30] We were of the view that the maxim, "he who avers must prove" and prove he must on a balance of probabilities should be adhered to by the court. (See ss. 101 and 102 of the Evidence Act 1950; *Selvaduray v. Chinniah* [1939] 1 LNS 107; [1939] MLJ 253 CA; *UN Pandey v. Hotel Marco Polo Pte Ltd* [1978] 1 LNS 223; [1980] 1 MLJ 4; *Sundram Ramasamy v. Arujunan Arumugam & Anor* [1994] 4 CLJ 300 and *Syed Mohamed Syed Alwi & Ors v. Shariffah Badariah Alwi Al-Attas & Ors And Other Cases* [2009] 1 LNS 1234).

[33] We are of the view that the invoices, if any, were and are material and best evidence to determine the existence of the alleged outstanding balance and to establish the number of days outstanding as required under cl. 9.23. It is improbable for the learned JC to rely on oral testimony of witnesses, which at best is corroborative in nature. The existence and the contents of the invoices must be proved by the production of the invoices in the court. The burden of proof lies on the plaintiff. If a party has failed to discharge its burden of proof on the standard required by the law, his adversary does not bear the burden to adduce any evidence. It is not the defendant's duty to fill up the gaps in the plaintiff's case (see *The Carbon Company Sdn Bhd v. Ng Lee Hoon* [2017] 6 CLJ 189).

[34] In the instant appeal, the learned JC not only relied on oral testimony without proof the existence of the invoices, the important documents to establish the plaintiff's claim, His Lordship had reversed the burden of proof from the plaintiff to the defendant in relation to the three invoices. His Lordship criticised and put the blame on the defendant for the failure of the defendant to disprove the purported invoices and the outstanding amount thereunder. We agreed that the learned JC had committed an error in law and in fact when he reversed the burden of proof to the defendant (see *Keruntum Sdn Bhd v. The Director of Forests & Ors* [2017] 4 CLJ 676).

[35] By relying on the oral evidence of plaintiff's witnesses which are secondary in nature, the learned JC had breached the provisions of ss. 65 and 66 of the Evidence Act 1950 due to failure by the plaintiff to produce the alleged three invoices. Sections 65 and 66 were in the following terms:

> 65. (1) Secondary evidence may be given of the existence, condition or contents of a document admissible in evidence in the following cases:
>
> (a) when the original is shown or appears to be in the possession or power:
>
> (i) of the person against whom the document is sought to be proved;
>
> (ii) of any person out of reach of or not subject to the process of the court; or
>
> (iii) of any person legally bound to produce it,
>
> and when after the notice mentioned in section 66 such person does not produce it;
>
> (b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;
>
> (c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot for any other reason not arising from his own default or neglect produce it in reasonable time;
>
> (d) when the original is of such a nature as not to be easily movable;
>
> (e) when the original is a public document within the meaning of section 74;
>
> (f) when the original is a document of which a certified copy is permitted by this Act or by any other law in force for the time being in Malaysia to be given in evidence;
>
> (g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection.

(2)(a) In the cases referred to in paragraphs (1)(a), (c) and (d) any secondary evidence of the contents of the document is admissible.

(b) In the case referred to in paragraph (1)(b) the written admission is admissible.

(c) In the case referred to in paragraph (1)(e) or (f) a certified copy of the document but no other kind of secondary evidence is admissible.

(d) In the case referred to in paragraph (1)(g) evidence may be given as to the general result of the documents by any person who has examined them and who is skilled in the examination of such documents.

66. Secondary evidence of the contents of the documents referred to in paragraph 65(1)(a) shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his advocate, such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the court considers reasonable under the circumstances of the case:

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases or in any other case in which the court thinks fit to dispense with it:

(a) When the document to be proved is itself a notice;

(b) When from the nature of the case the adverse party must know that he will be required to produce it;

(c) When it appears or is proved that the adverse party has obtained possession of the original by fraud or force;

(d) When the adverse party or his agent has the original in court;

(e) When the adverse party or his agent has admitted the loss of the document; or

(f) When the person in possession of the document is out of reach of or not subject to the process of the court.

[36] We observed that the plaintiff had failed to give reasonable notice to the defendant as required by ss. 65 and 66 of the Evidence Act 1950 whereby the scales should be tilted in favour of the defendant.

[37] Next question to ask is was there termination or repudiation of contract by the defendant without any reasonable cause as provided under cl. 9.23 (b) of the said agreement. From our reading of cl. 9.23 (b) and cl. 9.24, it provides that should the defendant terminate the said agreement, the plaintiff is entitled to determine its employment with the defendant. We did not find any hard evidence that the defendant had terminated or repudiated the said agreement. Even the plaintiff's own witnesses, PW1 admitted that the defendant had never terminated the said agreement. At pp. 54-55, appeal record vol. 2A part B, PW1 said this:

Q19	:	I refer to you CB1, Part A, page 14 at Clause 9.23 (b). Did you give any notice in writing to determine the engagement to SLDB?
A	:	No.
Q20. PUT	:	I put to you that you had never determined Teraju Hijau Sdn Bhd's engagement to SLDB for the oil palm nursery. Yes or no"
A	:	Yes.
Q21. PUT	:	I put to you that SLDB had never terminated this Agreement. Yes or no?
A	:	Yes.
Q22. PUT	:	I put to you that pursuant to Clause 9.23 of the Agreement, Teraju Hijau Sdn Bhd had no right to terminate this Agreement. Yes or no?
A	:	Yes.
Q25. PUT	:	I put to you that SLDB intended to proceed with the Agreement. Yes or no?
A	:	Yes.

[38] We agreed with the defendant's contention that the plaintiff had wrongfully assumed that the defendant had repudiated the agreement and as such the plaintiff's election to accept the purported repudiation is invalid and/or bad in law. Therefore, the learned JC erred in law and in fact when His Lordship held that the plaintiff was entitled to determine the employment of operator (plaintiff) under the said agreement by giving notice in writing to the defendant.

[39] The plaintiff gave notice dated 13 January 2015 (P4) in an attempt to determine the said agreement. We observed that the plaintiff gave the defendant seven days to respond. We also observed that the defendant replied on the next day, that is, on 14 January 2015 expressing their intention to proceed with the said agreement. We reproduce the contents of the defendant's solicitors' letter dated 14 January 2015 which can be found at p. 324, appeal record vol. 2B, part B & C as below:

Date : 14th January, 2015.

MESSRS. CHIN, MIRDIN & CO.
Advocates & Solicitors
M.P.T. 4208, Lot 29-32, 1st Floor
Block C, Bandaran Baru, Jalan Baru
91025 Tawau, Sabah

"Without Prejudice"
By Fax & By Hand
089 – 763 369

Dear Sirs,

RE: AGREEMENT DATED 22ND JUNE 2010 FOR THE DEVELOPMENT, SUPPLY AND OPERATION OF OIL PALM NURSERY AT TONGOD, SANDAKAN.

> We act for Sabah Land Development Board (SLDB) and your letters dated 9th December, 2014 and 13th January, 2015 addressed to our client pertaining to the above matter refers.
>
> We are instructed by our client to inform you that presently our client does not have any new development projects at Tongod area.
>
> In the premises, our client is offering to your client the following:
>
> 1. To proceed to raise up 200,000 seedlings only and extend the abovementioned Agreement for another year from the expiration date (21st June 2015); and
> 2. As for the balance of seedlings will be advised from time to time by our Client should a new development project opens up at other area(s) and first offer will be given to your client to be the nursery operator.
>
> Our client looks forward to your favourable reply.

[40] It is clear to our mind that the defendant was never had any intention to terminate or repudiate the said agreement. Instead, the defendant was offering to extend the said agreement for another year and invited the plaintiff to negotiate the matter. There is evidence on records to that effect, that there were some negotiations went on between the parties right until the letter of termination dated 6 March 2015 (P6) by the plaintiff together with the writ of summons and statement of claim served on the defendant. There was no evidence of an absolute refusal to perform their part of the contract by the defendant. Therefore, it is our judgment that the plaintiff was not justified in repudiating the said agreement.

[41] We agreed with the defendant that the learned JC erred in law and in fact when His Lordship misconstrued cl. 9.23 (b) by holding that the defendant had breached cl. 9.23 (b) by evincing an intention not to be bound by the said agreement thereby entitling the plaintiff to liquidated damages under cl. 9.24 when cl. 9.23 (b) contemplates an act by the defendant terminating the said agreement. We also agreed that the learned JC was wrong when he proceeded to hold that the defendant had breached cl. 9.23 (b) after having made a finding that the defendant had not terminated the said agreement.

[42] In *Filati Lastex Elastofibre (M) Sdn Bhd v. Nikseng Development Sdn Bhd* [2009] 1 LNS 162; [2009] 8 MLJ 37A, Balia Yusof J (now FCJ) on related issue, held:

> [26] .... Whether a breach of contract amounts to repudiation is a serious matter not lightly found or inferred. What has to be established is that the defaulting party has made his intention clear beyond reasonable doubt that he will no longer perform his side of the bargain. Proof of such an intention requires an investigation, *inter alia*, of the nature of the contract, the attendant circumstances and the motives which prompted the breach (see *Chesire, Fifoot and Furmston's Law of Contract* Singapore and Malaysian Ed, 1994 by Andrew Phang Boon Loong, at p 763). Mohamed Azmi SCJ

in *Rasiah Munusamy v. Lim Tan & Sons Sdn Bhd* [1985] 2 MLJ 291, stated at p 294:

> It should be observed that not every refusal to perform some part of a contract will amount to a renunciation. Even a deliberate breach will not necessarily entitle the innocent party to treat himself as discharged, since it may sometime be that such a breach can appropriately be sanctioned by damages … if there is an absolute refusal to perform, the other party may treat himself as discharged. Short of an express refusal however, the test is to ascertain whether the action or actions of the party in default are such as to lead a reasonable person to conclude that it no longer intends to be bound by its provisions. Where such an inference cannot be drawn, the innocent party will be entitled to claim damages for breach, but not a treat himself as discharged.

[43] We observed that the purported letter of termination dated 31 March 2015 (P6) from the plaintiff to the defendant was made on a "without prejudice" basis. We found the letter P6 was quite important as it was the last attempt made by the plaintiff to determine the said agreement. Contents of P6 were as follows:

> Messrs J.T KULAI & CO. 31st March 2015
>
> Advocates & Solicitors
> Unit No. F3.47, 3rd Floor "Without Prejudice"
> Kompleks Asia City By Fax & Post
> Jalan Asia City
> 88000 Kota Kinabalu
>
> Dear Sirs,
>
> RE: AGREEMENT DATED 22ND JUNE 2010 FOR THE DEVELOPMENT, SUPPLY AND OPERATION OF OIL PALM NURSERY AT TONGOD, SANDAKAN
>
> With reference to your letter dated 4.2.2015, we regret to inform that our client is unable to accept your client's offer without taking into account the terms of our client's counter offer.
>
> Kindly advise your client of its duty under the above Agreement, Take Notice that unless your client takes step to perform the Agreement within seven (7) days from the date of this letter, our client shall entitle to assume that your client has intended no longer to be bound by the Agreement and has repudiated the same. In which case, our client shall proceed with legal action against your client for damages on wrongful termination of Agreement without the need to wait until its expiration date (21st June 2015).

[44] The learned JC was right when His Lordship ruled that the "without prejudice" letter from the plaintiff dated 31 March 2015 above-cited, was in admissible in evidence. However, the learned JC relied on the same "without prejudice" basis letter dated 14 January 2015 in holding that the plaintiff had succeeded in establishing that the defendant had evinced an intention not to

be bound by the said agreement. It is clear that the learned JC erred in law and in fact in his appreciation of the law relating to "without prejudice" letter of correspondences.

[45] In *Mazlan Aliman & Anor v. Lembaga Kemajuan Tanah Persekutuan* [2016] 1 LNS 971 referred by the learned JC, this court discussed the principles of law on a "without prejudice" basis as follows:

> [10] The main objective of "without prejudice" communication is that in the event the negotiations fail neither party should be able to rely upon any admission made in the course of the aforesaid negotiations. Based on the contents of the four (4) letter dated 10.12.2014 the parties were attempting to settle and to agree to the terms of settlement. However, the Defendant had informed the Plaintiff that the settlement was subject to approval from its Chairman. In the final "without prejudice" letter to the Plaintiff the Defendant had stated that the parties will proceed to record consent judgment. However, the Plaintiff did not respond to the said letter confirming the intention to record consent judgment. Since it was a "without prejudice" letter the negotiations were still open and the parties were still at liberty to either further discuss settlement or to proceed with the trial.
>
> [11] It is settled law that letters written "without prejudice" are inadmissible in evidence of the negotiation attempted. In our considered view the High Court Judge had applied the correct principles of law when she found that there was no concluded agreement between the parties to record a consent judgment.

[46] There was this letter from the plaintiff dated 5 May 2015 which is quite important to show intention not to terminate the agreement even after the letter P6 was sent to the defendant. This letter of 5 May 2015 proved the defendant's contention that parties were still in the midst of negotiation even after the writ was served on the defendant. The letter disclosed the following:

> 5th May 2015
>
> Messrs J T Kulai & Co.,
> Advocates & Solicitors,
> Unit No. F3.47, 3rd Floor,
> Kompleks Asia City,
> Jalan Asia City,
> P.O. Box No. 13777,
> 88843 Kota Kinabalu, Sabah
>
> By Fax & Post
> Without Prejudice
>
> Dear Sirs,
>
> RE: AGREEMENT DATED 22ND JUNE 2010 FOR THE DEVELOPMENT, SUPPLY AND OPERATION OF OIL PALM NURSERY AT TONGOD, SANDAKAN
>
> We refer to your letter dated 28th April 2015.
>
> Please be informed that our client is agreeable in principle to the offer of your client to take supply of 1,000,000 seedlings from them over a period of five (5) years however subject to the terms and conditions to be discussed and agreed upon.

Kindly arrange and fix a suitable date for an official meeting between the parties and their solicitors with the view to resolve this matter amicably.

We looking forward to hear from you soon.

[47] Now we come to the final issue on liquidated damages. The learned JC awarded liquidated damages in the sum of RM2,000,000 to the plaintiff based on the calculation as provided in cl. 9.24 of the said agreement. It is not disputed that in the event of such determination under cl. 9.23, the defendant shall pay the plaintiff liquidated damages in the sum of RM2 for each of the existing seedlings at the said nursery and the remaining seedlings from the agreed 1,300,000 seedlings yet to be delivered to the nursery at the time of termination. It was not disputed as that at the time of the so-called terminations of the said agreement by the plaintiff, some 284,860 seedlings had been delivered leaving the balance of 1,015,140 seedlings still undelivered giving a figure of RM2,030,280. Nevertheless, the plaintiff in their submission willingly reduced the shortfall to RM2,000,000.

[48] We agreed with the defendant's submission before us that since the plaintiff had failed to prove their case on a balance of probabilities, their claim on the liquidated damages must fail. It is our judgment that the plaintiff had failed to prove that the said agreement was duly terminated due to the breach of contract by the defendant. We also held that the purported termination and/or repudiation of the said agreement by the plaintiff was premature and unlawful; and not due to any breach by the defendant.

[49] In *Perbadanan Kemajuan Negeri Selangor v. Selangor Country Club Sdn Bhd* [2016] 8 CLJ 211, this court held:

As to damages, it is settled law that in order for SCCSB to succeed in its claim SCCSB must show that the loss and damages is due to the breach of contract by PKNS. Once that is established, SCCSB has the additional burden of proving the damages. The law on the recovery of damages has been succinctly enunciated by Ramly Ali J (now FCJ) in *PB Malaysia Sdn Bhd v. Samudra (M) Sdn Bhd* [2008] 1 LNS 679; [2009] 7 MLJ 681 at 697. It may be summarised into two main principles:

(i) The burden of proof is on the party seeking the claim to prove the facts and the amount of damages (*Hock Huat Iron Foundry v. Naga Tembaga Sdn Bhd* [1999] 1 CLJ 89; [1999] 1 MLJ 65; *Bonham-Carter v. Hyde Park Hotel Limited* (1948) 64 TLR 177; *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635; [1989] 3 MLJ 360 and *Sony Electronics (M) Sdn Bhd v. Direct Interest Sdn Bhd* [2007] 1 CLJ 611; [2007] 2 MLJ 229).

(ii) The damages must be proved with real or factual evidence. Mere particulars, summaries, estimations or general conclusions will not suffice (*Lee Sau Kong v. Leow Cheng Chiang* [1960] 1 LNS 56; [1961] MLJ 17).

(emphasis added)

Conclusion

[50] Upon a close scrutiny of the facts and the law before us, we found that decision of the learned JC in allowing the plaintiff claim could not be sustained. We are constrained to hold that there was a misdirection on the law and on the facts by the learned JC in allowing the plaintiff's claim and in awarding damages to the plaintiff.

[51] Based on the aforesaid, we unanimously allowed the appeal with costs of RM10,000 to the defendant/appellant subject to payment of the allocator fee. The decision of the High Court is set aside. The deposit was refunded to the defendant/appellant.

[52] We therefore ordered accordingly.